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No. 90-1266, 90-1262

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner,*

*V.*

STATE OF OKLAHOMA, *et al.*,  
*Respondent.*

STATE OF ARKANSAS, *et al.*,  
*Petitioners,*

*V.*

STATE OF OKLAHOMA, *et al.*,  
*Respondents.*

*On Writs of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit*

BRIEF OF SCENIC RIVERS ASSOCIATION OF OKLAHOMA,  
CITY OF TAHLEQUAH OKLAHOMA, LAKE TENKILLER  
ASSOCIATION, TENKILLER AREA COMMUNITY  
ORGANIZATION, CITIZENS' ACTION FOR A SAFE  
ENVIRONMENT, SAVE THE LOWER ILLINOIS RIVER, AND  
CALCASIEU LEAGUE FOR ENVIRONMENTAL ACTION NOW,  
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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CALCASIEU LEAGUE FOR ENVIRONMENTAL ACTION NOW,  
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

ECOLAW INSTITUTE respectfully moves for leave to submit this brief on behalf of amici Scenic Rivers Association of Oklahoma, City of Tahlequah Oklahoma, Lake Tenkiller Association, Tenkiller Area Community Organization, Citizens' Action for a Safe Environment, Save The Lower Illinois River, and Calcasieu League For Environmental Action Now in support of the Respondents. Attorneys for Petitioner E.P.A. and for Respondent have consented to the filing of such Brief, and Attorney for Petitioner Arkansas has not responded. We urge this Court to affirm the decision by the United States Court of Appeals for the Tenth Circuit in Oklahoma v. E.P.A., 908 F.2d 595 (10th Cir. 1990).<sup>1</sup>

INTEREST OF THE AMICI CURIAE

Amicus Scenic Rivers Association of Oklahoma is a nonprofit organization promoting the recreational enjoyment of Oklahoma and national scenic waterways. Its members engage in primary body contact recreational use of the Oklahoma-designated Scenic Illinois River. Its members study biotic associations in high-quality waters. Just commercial canoeing on the Illinois River has declined by 32% since 1984, from 67,204 in 1984 down to 46,000 in 1990, and Amicus is vitally affected by the quality of water in the Illinois. Among other activities, Amicus cosponsors a Campfire Lecture Series at an amphitheater on one of several State campgrounds on the Illinois, featuring such topics as the Endangered Species populations which are habitat-dependent on the quality of water in the Illinois.

Amicus City of Tahlequah, Oklahoma is a city of approximately 10,000 persons. Tourism represents a major portion of the economic base for the area and the Illinois River and Lake Tenkiller attract a substantial part of the

tourist trade. About 550 jobs in Cherokee County are directly attributable to tourism and the visitor industry, generating about 38 million per annum in Cherokee County. Tahlequah is the only Oklahoma city discharging into the Illinois River above Lake Tenkiller. Its utilities trust is presently completing a state of the art estimated 7.5 million dollar sewage treatment facility and peakflow storage basins. Tahlequah gets its municipal water supply from the Illinois River, downstream from the objectionable discharge. If the Tenth Circuit decision is disturbed, then Tahlequah's water supply will contain a higher level of sewage effluent constituents than presently contributed by the *vested* Arkansas National Pollution Discharge Elimination System (NPDES) permit holding cities.

Amicus Lake Tenkiller Association members are frequent or occasional recreational users of the Illinois River for floating, rafting, enjoying wildlife, and relaxing at the many resorts along the Scenic-designated portion of the Illinois River. Its members primarily reside within a 90-minute drive of the Illinois. The Illinois River, and the downstream affected Lake Tenkiller are the prime immediate recreational resources for the Tulsa Oklahoma area, and its members are suffering loss of recreational opportunities by reason of the interim discharge of Fayetteville effluent, both as per the overturned permit and the violations thereof. Its members would suffer economic and aesthetic harm if the Court were to reverse the decision favorable to Lake Tenkiller.

Amicus Tenkiller Area Community Organization is an incorporation of individuals in the Lake Tenkiller geographical area, providing quasi-governmental services such as fundraising for community fire and water entities, and other amenities supplanting industrial development in support of the economic base in the Lake Tenkiller geographical area. TACO is comprised of community

volunteers. An adverse decision would indirectly open the Lake community to other types of water-polluting industry and diminish tourism revenues directly.

Amicus Citizens' Action for a Safe Environment is a Not for Profit Oklahoma corporation. Its members from Oklahoma, Arkansas, and other states, enjoy the pristine beauty and recreational and therapeutic qualities which are afforded select waters by the Oklahoma Nondegradation Water Quality Standard. If this discharge into the Illinois is permitted, CASE members' health would be adversely affected by Fayetteville's effluent, which is, in solution, a liquid waste, a pollutant.

Amicus Save the Lower Illinois River is an Oklahoma Not for Profit corporation. Its members include businesses and individuals in the lower reach of the Illinois below Lake Tenkiller Ferry, and which also derive economic livelihood from the lake area. Its members would suffer economic harm if the decision below is not upheld, because area tourism is directly dependent upon the quality of Lake Tenkiller's water, which is fed by the Illinois River. If the 10th Circuit decision were set aside, recently-documented preliminary eutrophication in Lake Tenkiller would accelerate.

Amicus Calcasieu League for Environmental Action Now is a not for profit Louisiana organization representing 500 individual members who share a common concern for the sustension of functional ecosystems and preservation of clean water for human and nonhuman consumption. A reversal would negatively impact downstream states' ability to foster and promote wildlife for enjoyment by CLEAN's members.

#### SUMMARY OF ARGUMENT

The Tenth Circuit properly ruled that E.P.A. abused



its discretion in granting the Fayetteville permit. The views of Petitioners cannot be adopted without violating the congressional goals and policies of the Clean Water Act. Applying downstream states standards to upstream state sources meets the goals and statutory language of the Clean Water Act. Once a state water quality standard is approved, E.P.A. may not redefine the state's goals. Reversal of the Tenth Circuit Decision would lead to continued degradation of the Illinois River and Lake Tenkiller. The Illinois is a candidate for inclusion in the National Wild and Scenic Rivers Program, and is already an Oklahoma-designated Scenic River. The City of Fayetteville should continue its historical discharge of all effluent into the White River. The Supreme Court should not disturb the decision of the Court of Appeals.

#### ARGUMENT

- I. UPHOLDING THE TENTH CIRCUIT IS THE ONLY DECISION WHICH CAN BE RENDERED CONSISTENT WITH THE CONGRESSIONAL GOALS & POLICIES OF THE CLEAN WATER ACT. A CONTRARY DECISION WOULD ERODE THE MEANING AND INTENT OF THE CLEAN WATER ACT.

This Court must rule consistent with the goals and policies of the Clean Water Act, which is to restore and maintain the chemical, physical and biological integrity of the Nation's waters.<sup>1</sup> A decision compromising this goal cannot be rendered within the NPDES permit system. Congress recognizes the primary responsibilities of the

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<sup>1</sup> 33 USC 1251.

states to prevent, reduce and eliminate pollution.<sup>2</sup> The Act does not authorize states or the EPA to create, increase nor perpetuate interstate pollution.

The regulatory framework of the permit issuance process clarifies the Court's appropriate role below: The Court may review additional material to explain the basis of the agency's action and the factors the agency considered.<sup>3</sup>

The Clean Water Act provides a two-phase involvement of downstream states: certification and licensing. The decision in Ouellette, which forms the foundation of the City of Fayetteville's appeal, is not determinative in this case, because it dealt with 33 U.S.C. 1342 licensing, not 33 U.S.C.1341(a)(2) certification. Both Oklahoma and E.P.A. agree that if imposing conditions cannot insure compliance with downstream state standards, the administering agency (in this instance E.P.A.) shall not issue such license or permit.<sup>4</sup>

As a prerequisite to certification for permit

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<sup>2</sup> 33 USC 1251(b).

<sup>3</sup> Churchwell v. Robertson, 748 F.Supp. 768 (D.Idaho 1990) citing Friends of the Earth v. Hintz, 800 F.2d [822] at 829 [(9th Cir. 1986)]; Asarco, Inc. v. EPA, 616 F.2d 1153, 1159-60 (9th Cir. 1980). Moreover, the Court may consider, particularly in highly technical areas, substantive evidence going to the merits of the agency's action where such evidence is necessary as background to determine the sufficiency of the agency's consideration. Asarco, id.

<sup>4</sup> International Paper Co. v. Ouelette, 479 U.S. 481 (1986). The Court in Ouellette was silent as to certification, addressing instead the second of the two-phase process of permit authorization, and the discretionary level. Distinguish 33 USC 1341(a)(2) is not the discretionary phase-- achieving consent of the downstream state at 33 USC 1341(a)(2) is mandatory. See also, E.P.A. Brief, Footnote 22, page 18.



issuance, Fayetteville was to provide the EPA Administrator with certification that its discharge would comply with, *inter alia*, the water quality-related effluent limitation standards, water quality standards and implementation standards of the Clean Water Act.<sup>5</sup> Oklahoma had in place a New Point Source ban and policy opposing all degradation of the Oklahoma-designated Scenic Illinois River, beginning just 39 miles below the municipality's Split Flow Facility.

The Tenth Circuit set aside the EPA's determination that imposing conditions could assure compliance with Oklahoma Water Quality Standards as measured at the state border. EPA's decision was unsupported by substantial evidence.<sup>6</sup> EPA ruled that the permit as granted, would not degrade the Illinois because effluents were reduced to undetectable limits. The Tenth Circuit noted, as all parties agree, that 25% of the unacceptable bioavailable nutrients would enter the Scenic-designated portion of the Illinois River. Clearly, the undetectable standard, if *necessary* in light of the statute's plain language, was violated and the Tenth Circuit properly so ruled.<sup>7</sup>

A second aspect of this was that detectability is measured in light of "current condition" of the Illinois River. EPA seems to espouse that nothing in the nondegradation policy states when the Illinois should not

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<sup>5</sup> 33 USC 1341(a).

<sup>6</sup> Quivira Mining Company v. U.S. Environmental Protection Agency, 765 F.2d 126, (10th Cir. 1985).

<sup>7</sup> Oklahoma in its Brief before E.P.A. defined degradation as any detectable increase in wastes. Distinguish, there is a 6.1 million gallon per day detectable increase in wastes, offset only by such evaporation as may occur prior to reaching the scenic-designated portion.

be degraded. Since EPA has not forced other Arkansas cities to tool-up to appropriate technology, this effluent will blend with existing Arkansas effluent. Comparing this facility's effluent with that of Arkansas's other five cities dumping into the Illinois, EPA apparently concluded that Fayetteville doesn't look so bad. Just because there are existing permits on the Illinois which affect the water more adversely due to use of outmoded technology, does not justify violating the ban on new sources.

A. APPLYING DOWNSTREAM STATE STANDARDS  
TO UPSTREAM STATE SOURCES MEETS THE  
GOALS AND STATUTORY LANGUAGE OF THE  
CLEAN WATER ACT.

Both Oklahoma and EPA agree that EPA correctly mandatorily applied the Oklahoma Water Quality Standards for the Illinois River at the state line.<sup>8</sup> The question is whether EPA must defer interpretation to the Administrator of an EPA-approved State Implementation Plan. If not, must EPA interpret Oklahoma Water Quality Standards according to the plain meaning of the regulations?<sup>9</sup> And if not, may EPA interpret the

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<sup>8</sup> 33 U.S.C. 1341(a)(2) states, in relevant part: [The permitting agency] based upon the recommendations of such State, the Administrator; and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit. (*emphasis added.*)

<sup>9</sup> It did not. "Undetectable" degradation is not equivalent to "nondegradation." The former is a function of technological limit on analysis, based upon dilution (which is not a Beneficial Use). The latter is a measure of river ecosystem functionality, which distinguishes

Oklahoma Water Quality Standard such that the result violates the language and intent of the Oklahoma Nondegradation Policy and the Clean Water Act?<sup>10</sup> If any of these queries cannot be answered affirmatively, then the Appellee must prevail.

The EPA in its Brief at page 6 omits the most crucial language of the Clean Water Act applicable to this proceeding. True, the EPA may condition such permit ...as...necessary to insure compliance with applicable water quality requirements. But [if] the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.<sup>11</sup>

Downstream states have a voice in upstream activities affecting their water quality within the ambit of the Clean Water Act. In United States v. Marathon Development Corp., 867 F.2d 96, 99-100 (1st Cir. 1990), the Court stated:

The ability of states to enforce their own more stringent water quality standards by denying certification for a ... permit is consistent with the legislative purpose and history of the Clean Water Act. Congress declared its policy 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and

return water quality from ambient water quality, comparing the quality of each independently.

<sup>10</sup> It may not. The "undetectable" standard was not met, as evidenced by the admission that 25% of bioavailable nutrients from the facility would cross into the Scenic-designated portion of the river.

<sup>11</sup> 33 USC 1341(a)(2).

eliminate pollution.' 33 U.S.C. Sec. 1251(b).<sup>12</sup>

B. ONCE A STATE WATER QUALITY STANDARD IS APPROVED BY EPA, EPA MAY NOT REDEFINE THE STATE'S GOALS.

Arkansas did not have an National Pollution Elimination System permit program in place when the Fayetteville permit was sought, thus the Fayetteville permit application was administered thru EPA. The structure of State-State conflict resolution is inapplicable where EPA exercises this default jurisdiction, because EPA administers the program where there is no state program in place. Under the EPA default jurisdiction provisions, EPA does not enjoy an arbiter's veto power under the Clean Water Act. Rather, Oklahoma (as an affected state) is afforded the historical judicial review process which has existed since 1948.

The Administrator is required by 33 USC 1251 et seq. to include more stringent state limitations necessary to meet state water quality standards, and lacks authority to set aside or modify those limitations in permit proceedings.<sup>13</sup>

<sup>12</sup> "The legislative history of section 401 of the Act ("Certification") confirms that Congress intended to give states [a voice] over the grant of federal permit authority for activities potentially affecting a state's water quality." *Id.*, 867 F.2d 101. Additionally, the Court held that allowing states to impose, in the context of a federal law, their own more stringent environmental standards is not unique and has never been held to be irrational or unconstitutional.

<sup>13</sup> In Re Bethlehem Steel Corporation, (GCO #58, March 29, 1977).

The state of Oklahoma on three occasions submitted its nondegradation policy and beneficial use criteria for EPA interpretation, modification or rejection. In 1982, in 1985 and in 1988, EPA accepted the Oklahoma Standard without interpretation or modification.<sup>14</sup> By doing so, the Oklahoma Water Quality Standard

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<sup>14</sup> EPA is free to approve or disapprove state water quality standards without judicial review. Westvaco Corp. v. US E.P.A., 899 F.2d 1383 (4th Cir. 1990). But once standards have been implemented by the State, EPA no longer has interpretive capability. 33 USC 1313 *distinguishes* interstate from intrastate Water Quality Standards, and provides in relevant part:

The...State water pollution control agency of such state shall from time to time (but at least once each three year period ...) hold public hearings for the purpose of reviewing applicable water quality standards and as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(c)(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes, and also taking into consideration their use and value for navigation.

supplanted federal interpretation.<sup>15</sup> EPA's role at 33 USC 1341(a)(2) becomes one of identifying the entities which may be affected, affording a hearing, accepting evidence, and conditioning the license as necessary to comply with achievement of all applicable water quality requirements.<sup>16</sup> If an affected state determines that discharges from a certain category of activity will not meet state water quality requirements, the federal government is prohibited from authorizing the activity by issuance of a federal permit.<sup>17</sup> To interpret 33 USC 1341 as affording States sovereignty in certification but not in interpretation of their standards is inconsistent and unsupported by the language and caselaw at 33 USC 1341. States in both roles will usually be affected states, and states in both roles must interpret applicable state (not federal) statutes and regulations. The EPA's role was exercised in the review process, whereby triennially it recommends interpretation or modification or may even reject water quality standards.<sup>18</sup> Upon approval, EPA's window of interpretive opportunity closed.

State water quality criterion substitute for the

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<sup>15</sup> 33 U.S.C. 1342(b); 33 U.S.C. 1370.

<sup>16</sup> In Re Indianapolis Power & Light Co. (1975) U.S. E.P.A. NPDES Permit Op. No. 14; Re United States Steel Corp. (1975) U.S. E.P.A. NPDES Permit Op. No. 17, the EPA was held to have an obligation to include conditions more stringent than the EPA minimums where required by the terms of state certification provided pursuant to 33 U.S.C. 1341.

<sup>17</sup> United States v. Marathon Development Corporation (1989, CA1 Mass) 867 F.2d 96.

<sup>18</sup> Oklahoma's nondegradation policy was never challenged by EPA in the appropriate triennial review setting.



Federal equivalent once the standards are approved by the Secretary.<sup>19</sup>

EPA's supplantation of Oklahoma water quality standard violates the decision in In re Bethlehem Steel Corporation, (GCO #58, March 29, 1977).<sup>20</sup> In the case before this Court. EPA lowered the water quality standard for the Illinois by its interpretation. It did so without affording notice and opportunity for the affected state to exercise its prime role. This violated EPA's regulation.<sup>21</sup>

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<sup>19</sup> US v. Rivera Torres, 656 F.Supp 251 (D. Puerto Rico 1987). Torres involved a Section 404 permit.

<sup>20</sup> "EPA has no authority to ignore State certification or to determine whether limitations certified by the State are more stringent than required to meet the requirements of State law. (See Decision of General Counsel, No. 44)." Id., p. 338. This decision recognizes that EPA has some latitude, to effectuate more stringent standards where necessary to meet the timetable of 301(b)(1)(C), where it states:

In enacting Section 401, Congress clearly intended to give the states an opportunity to assure that federally-issued NPDES permits contained limitations necessary to implement the State's water quality standards. There is no indication in the Act, or in the legislative history, however, that Section 401 was intended to limit the authority and obligation of EPA to independently assess the need for more stringent conditions to meet the requirements of Section 301(b)(1)(C).

<sup>21</sup> EPA regulations provide that "in determining whether such standards are attainable for any particular segment, the [permitting agency] should take into consideration environmental, technological, social, economic, and institutional factors." 40 C.F.R. 130.17(c)(1). EPA's regulations are more specific in regard to downgrading existing water quality standards. Standards may be lowered *only* when the State can demonstrate that one of three factual situations exists:

- (i) The existing designated use is not attainable because of natural background;

Here, EPA's "undetectable" standard fails to include factors to be considered and methodology to be used to judge compliance with such a standard.<sup>22</sup> By any definition, "detectable" is a more blurred standard than is applied by Oklahoma to its own potential Point Sources wishing to site on the Illinois. E.P.A. uses a subjective, not objective, compliance standard. It invites years of litigation over every conceivable aspect of detection.<sup>23</sup>

The Illinois at the Scenic boundary, still bears 25% of Fayetteville's bioavailable nutrients. Also, by Petitioners' own admission, phosphorous would not be fully assimilated by the Illinois before reaching the Oklahoma-designated Scenic reach. By determining that this remaining 25% bioavailable nutrient load is "undetectable," the Administrative Law Judge on remand ruled arbitrarily and capriciously.

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- (ii) The existing designated use is not attainable because of irretrievable man-induced conditions; or

- (iii) Application of effluent limitations for existing sources ... would result in substantial and widespread adverse economic and social impact.

<sup>22</sup> Champion International Corporation v. US EPA, 652 F.Supp. 1398 (DC WD NC, 1987).

<sup>23</sup> Nondetectable by the Administrator, the affected state or the source state? Objectively traceable or nonspecifically attributable? Traceable but no longer a New Point Source? Ambient cumulative or viewed in isolation from waste load synergistics? Nondetectable in the static sense-- as measured only for certification? Nondetectable in the dynamic sense-- as measured once per five years? Nondetectable at every moment? Detectable by chemists? Detectable by aquatic organisms? Detectable by affect on aquatic organisms, and if so, how much causation is required?

II. REVERSAL OF THE TENTH CIRCUIT DECISION WOULD LEAD TO CONTINUED DEGRADATION OF THE WATER QUALITY OF THE ILLINOIS RIVER AND LAKE TENKILLER.

Oklahoma's NONDEGRADATION Criterion is distinct from and unrelated to the "detectable" standard applied by EPA. EPA in effect violated Oklahoma Water Quality Standard by gauging the permit on detectability, because the Oklahoma rule prohibits ALL new point sources on the Illinois. Oklahoma cities and businesses absorb the preponderance of the economic impact of its criterion.

Clearly the existence of a New Point Source has a DETECTABLE and MEASURABLE affect on the quality of Illinois River Water. One detectable modification to the ecosystem is an increased flow volume of three million gallons per day, of effluent. the EPA concedes that phosphorous would not be completely assimilated by the time it reaches the Scenic River boundary.<sup>24</sup> Petitioners' Brief admits that nutrients in the effluent will not be totally absorbed."<sup>25</sup>

A. THE ILLINOIS RIVER IS A CANDIDATE FOR INCLUSION IN THE NATIONAL WILD AND SCENIC RIVERS PROGRAM.

Under the Wild and Scenic Rivers Act, state-designated Scenic Rivers are to be afforded agency

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<sup>24</sup> EPA Brief, page 9.

<sup>25</sup> Petitioners' Brief at page 6.

cooperation in their conservation.<sup>26</sup>

At its passage, the Illinois River was, and remains, a candidate for potential inclusion under the National Wild and Scenic Rivers Program.<sup>27</sup> In all planning for use of water resources, consideration shall be given by all Federal agencies involved to potential national scenic and recreational river areas.<sup>28</sup> Candidate rivers, such as the Illinois River, are to be afforded the cooperation of the head of any agency administering a component of the system, with appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution of waters of the river.<sup>29</sup>

B. THE ILLINOIS RIVER IS ALREADY AN OKLAHOMA-DESIGNATED SCENIC RIVER.

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<sup>26</sup> 16 U.S.C.1276(d) requires that "[i]n all planning for the use and development of water and related land resources, consideration shall be given by all Federal agencies involved to potential national wild, scenic and recreational river areas, and all river basin and project plan reports submitted to the Congress shall consider and discuss any such potentials. The Secretary of the Interior and the Secretary of Agriculture shall make specific studies and investigations to determine which additional wild, scenic and recreational river areas within the United States shall be evaluated in planning reports by all Federal agencies as potential alternative uses of the water and related land resources involved."

<sup>27</sup> 16 USC 1271-1287, particularly 16 USC 1276(a)(40).

<sup>28</sup> 16 USC 1276(d).

<sup>29</sup> 16 U.S.C. 1283(c) Under the 1986 Amendments, the EPA Administrator assumed water quality responsibilities theretofore mandated to the Secretary of the Interior where candidate rivers are involved. The average hourly discharge is one quarter million gallons per hour.



Under 1982 Regulations promulgated by the Oklahoma Water Resources Board, no degradation is allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance.<sup>30</sup> This prohibition applies to the Illinois, an Appendix A River.<sup>31</sup> No degradation interfering with or injuring instream water uses is allowable.<sup>32</sup> In these waters, the quality can only be protected, maintained and improved for the benefit of all the citizens.<sup>33</sup> The coliform bacteria from the Fayetteville facility, even under ideal conditions, is an obvious injury to instream use, which for the Illinois (unlike Arkansas' White River) includes Primary Body Contact Recreation.<sup>34</sup> Aesthetics is a key component of scenic river appeal. Floating materials, suspended substances producing objectionable color and turbidity, noxious odors and tastes, and material that settle to form

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<sup>30</sup> Oklahoma Water Resources Board Rules & Regulations, SECTION 3, Petitioner's App., page 28.

<sup>31</sup> Oklahoma Water Resources Board Rules and Regulations, Appendix A, Petitioner's App. p. 54.

<sup>32</sup> Oklahoma Water Resources Board Rules & Regulations, 1982, Section 3, Petitioners' App. p. 27.

<sup>33</sup> Id.

<sup>34</sup> Oklahoma Water Resources Board Rules and Regulations, Section 4.7, Petitioners' Appendix p. 42. In 1984, 67,204 float trips were taken with commercial canoe and rafting outfitters on the scenic-designated portion of the Illinois. About double that many commercial recreational visitors floated. This excludes all recreational users who did not rent canoes as a part of the river experience--fishing parties, campers, swimmers, birdwatchers, volleyball tournament-goers, canoe-racers, innertube floaters, etc.

objectionable deposits and interfere with aquatic life are prohibited.<sup>35</sup>

The 10th Circuit properly took into consideration the Scenic River designation for the Illinois River, measuring its 1970 designation date as the operative benchmark for determining whether nondegradation was being achieved. The Tenth Circuit held that where a proposed source would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards, such proposed source may not be permitted.<sup>36</sup> E.P.A. abused its

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<sup>35</sup> Oklahoma Water Resources Board Rules and Regulations, Section 4.10-4.10(e). Petitioners' Appendix, page 43-45. See also, *Flint Ridge Development Corp. v. Scenic Rivers Association of Oklahoma, et al.*, 426 U.S. 776. The case below concerned impairment of the aquatic food web by siltation which inhibits the reproductive cycle of the web-spinning caddis fly on the Illinois River. The caddis fly is a key component of the food supply of small fish. When turbidity affects temperature and caddis fly eggs are clogged in silt, inadequate darter and minnow populations are sustained, and predator fish populations decline proportionally. This affects fishing. Fishing affects camping and resort use. The human economy suffers. Resort owners supplement with agriculture. Trees are cleared, resulting in an increase in ambient instream water temperature. Runoff increases. Erosion increases. Remaining high quality waters on this continent are few and far between.

The decline in viable, intact, biodiverse stream ecosystems necessitates a shift in perception. Rather than measurable ambient chemical modification, (especially in light of the nascence of scientific stream ecology and the individualistic biotic characteristics of each stream), the most functional assurance that this river remains viable and unmodified for recreational and scientific enjoyment is *a priori* elimination of New Point Sources and progressive strengthening of Effluent Limitation Standards from historical discharges.

<sup>36</sup> *Oklahoma v. E.P.A.*, 908 F.2d 595, 620 (10th Cir. 1990); 31 ERC (BNA) 1741.



agency discretion: Oklahoma's State Water Quality Standard was uninterpretable, once approved by EPA; Oklahoma's State Implementation Plan had been approved by EPA as to both its goal and method of achievement; The downstream state's denial of certification was entitled to unequivocal mandatory deference afforded by 33 USC 1341(a)(2). The Court properly reversed EPA's misapplication of "nondegradation" to mean "undetectable degradation."<sup>37</sup>

III. THE CITY OF FAYETTEVILLE SHOULD CONTINUE ITS HISTORICAL DISCHARGE OF ALL EFFLUENT INTO THE WHITE RIVER.

Petitioner admits that nutrients and phosphorus loading would impact the Scenic-designated portion of the Illinois River.<sup>38</sup>

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<sup>37</sup> Undetectability is achieved thru dilution, but still constitutes a net assimilation burden to the River. Petitioners admit to the affirmative phosphate and nutrient burden, and never deny the diminution in affirmative water quality improvement historically appropriated for beneficial use instream by recreationists and aquatic organisms alike.

<sup>38</sup> EPA Brief, p. 9 and Petitioner Brief, p. 6. The recent study, conducted ancillary to the EPA "reopener" clause in the permit (as yet unreleased in final form), shows that by reason of the diminished quality of water flowing into Lake Tenkiller Ferry, eutrophication is in fact occurring as far downstream as below the scenic-designated portion of the Illinois, resulting in such oxygen depletion to the lake that, if not mitigated by a fully-integrated, stringent management control strategy upgrading all existing contributors (including Point and Nonpoint Sources), Lake Tenkiller would soon be unable to support existing aquatic life. Historical data supporting this result predates the additional 6.1 million gallon per day load to the River

Fayetteville should use its historical receiving waters rather than moving its pipe to the headwaters of the Scenic Illinois River. The State of Arkansas had never seen fit to implement White River water quality protections, and Arkansas (until more recently) was in default in administering a state implementation plan. Additionally, Fayetteville has a vested historical priority to a National Pollution Discharge Elimination System Permit on the White River.

The question of detectable impact on the Illinois assumes a threshold justification: Why seek a permit outside the historical receiving waters? Even including Fayetteville's old facility, which operated under lower Effluent Limitation Standards, the White River Water Quality Standards did not restrict new sources and did not include highest quality beneficial uses.

Arkansas would lack inherent motivation to operate the facility in a manner preserving downstream values if the decision were overturned, but would have inherent motivation to operate the facility in a manner preserving downstream values if the decision were sustained. The Clean Water Act can only be as effective as the good faith of the permit holders. Oklahoma is so concerned about preserving its few legislated scenic streams that it has enunciated a policy which prohibits any new pollution permits into their waters. Because Fayetteville is largely within the White River Basin, and because The White River remains in Arkansas for its entirety, the city has a greater incentive to preserve water quality, if its discharge is into in that river.

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occasioned by the Fayetteville facility.

## CONCLUSION

In light of Congress' purpose in crafting the legislation, the decision of the 10th Circuit must be sustained.

This decision does not govern where the upstream state administers the Clean Water Act. Only those eleven states which have defaulted in implementing a State plan fall outside the arbiter's power of the Environmental Protection Agency. In all other instances, the EPA retains final authority to grant or deny the permit and enjoys full agency deference in complying with approved state standards. Its decision is binding and reviewable under the "abuse of discretion" test.<sup>39</sup> EPA may modify or deny the license, but the clear language of the Clean Water Act is that the affected downstream state does apply its water quality requirements to discharges affecting the quality of its water, to certify or not certify the proposed activity. It applies narrowly. It binds the EPA to an objective role where functioning as both the permitting agency and the oversight authority, where the state in which the Source originates has defaulted to participate by enacting a State Implementation Plan. The policy basis of Ouellette, (prevention of overriding the permit requirements and policy choices of the Source State), is not challenged by the Tenth Circuit, since here, the Source State had no policy in place and since Ouellette addresses 33 U.S.C. 1342, not 33 U.S.C. 1341.<sup>40</sup>

This decision does not govern instances where the downstream state standard is less stringent than an evenhandedly-applied outright prohibition on New Point

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<sup>39</sup> 5 U.S.C. 706(2)(A).

<sup>40</sup> Id.

Sources for protection of a treasured river. Only in instances where the downstream state deems protection of a special waterway of such great importance that it is in good faith willing to permanently forego alternative economic development, would upstream sources which degrade stream quality be called into question. As stated in the Amici of Municipal Sewerage Agencies, et al., "Since a state has a strong stake in the ability of instate sources such as municipal treatment facilities to serve and support its residents, a state agency has an incentive not to set water quality standards that are impossible or economically infeasible for such sources."<sup>41</sup> In U.S. Steel Corp. v. Trane, 556 F.2d 822, 830 (7th Cir 1977) the Preemption Doctrine is placed in the context of the goal sought to be accomplished by its exercise in the first instance: "Congress thus has chosen not to preempt state regulation when the state has decided to force its industry to create new and more effective pollution-control technology." The cost externalization of which the Court was concerned in Ouellette is lacking under the facts before the Court in this instance: Oklahoma has completely foregone all municipal development on the Illinois River's Scenic stretch, for the purpose of preserving its recreational and biodiversity values.<sup>42</sup>

If this Court so elects, this decision can be limited to apply only as to a state-designated Scenic Stream which is a candidate for inclusion in the National Wild and Scenic Rivers program. Contrary to the chaos envisioned by Amici Metropolitan Sewerage Agencies, et al., the

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<sup>41</sup> Brief Amici Curiae of Municipal Sewerage Agencies, et al., page 15.

<sup>42</sup> Two species of endangered bats and an endangered darter are endemic to the River habitat.

Illinois River is a river which the state has elected to afford special status due to its unique, high quality recreational opportunities and quantified biological diversity. This decision does not, as argued by Amici Metropolitan Sewerage Agencies, et al., block permit renewals of *historical* dischargers on the Illinois which continue to upgrade their facilities utilizing the best available technology. At present some 11.6 million gallons per day of Arkansas effluent is being discharged into the Arkansas reach of the Illinois and its tributary streams.<sup>43</sup>

This decision applies only to New Sources seeking authorization to discharge which affects a designated state scenic river and National Wild and Scenic Rivers candidate, where the applicant's historical discharge point is not subject to high water quality standards, and where no compelling justification is given for protecting the Non-candidate, Non-scenic river, over an outstanding national resource waterway.

Because the Tenth Circuit properly interpreted the Clean Water Act as favoring clean water, in agreement with the *prima facie* language of the Clean Water Act and Congress' policy, and because this Honorable Court is also bound by the language and policy of the Clean Water Act, the decision below must be upheld.

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<sup>43</sup> These include Rogers, Arkansas, Prairie Grove, Arkansas, Springdale, Arkansas, Siloam Springs, Arkansas, Lincoln, Arkansas, Gentry, Arkansas, and Fayetteville, Arkansas, the latter of which is the only New Point Source. Fayetteville is the only nonhistorical discharger predating the Oklahoma Water Quality Standard. Several of these have significantly upgraded in conformance with the nonprohibitory nature of the Oklahoma nondegradation policy. One Oklahoma NPDES permit exists on the entire Upper Illinois, owned by the City of Tahlequah, a historical discharger which like Prairie Grove, Springdale, and Siloam Springs is upgrading to Best Available Technology.